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Supreme Court of the United States

October Term, 1960

No. 403

MORTON BORROW,

Petitioner,

against

FEDERAL COMMUNICATIONS COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL COMMUNICATION COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Morton Borrow respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on June 30, 1960 affirming an order of the Federal Communications Commission dated December 2, 1959 and released December 7, 1959.

Opinions Below

The opinions of the Court of Appeals are not yet officially reported, and are appended hereto as Appendix A. The opinion of the Federal Communications Commission is not reported and appears in the Joint Appendix submitted to the Court of Appeals at J. A. 75-98.

Jurisdiction

The date of the judgment of the Court of Appeals sought to be reviewed is June 30, 1960. It was entered on the same date. No application for a rehearing was made. Jurisdiction is conferred upon this Court by the Communications Act of 1934, as amended, 47 U. S. C. § 402(j) and by 28 U. S. C. § 1254.

Questions Presented

1. Whether the Federal Communications Commission has statutory authority to require that petitioner, an applicant for the renewal of his radiotelephone and radiotelegraph operator's licenses fill out a questionnaire, under oath, relating to his political beliefs, associations and activities.

2. If the Commission has such statutory authority, whether the application of the law to petitioner abridges his freedom of speech and association, in violation of the First Amendment.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First Amendment and Article 1, Section 9.

The statute involved is the Communications Act of 1934, 47 U. S. C. § 151 *et seq.*, the relevant portions of which are:

> "SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act."
>
> • • •

"Sec. 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

• • •

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified, except that in issuing licenses for the operation of radio stations on aircraft the Commission may, if it finds that the public interest will be served thereby, waive the requirement of citizenship in the case of persons holding United States pilot certificates or in the case of persons holding foreign aircraft pilot certificates which are valid in the United States on the basis of reciprocal agreements entered into with foreign governments;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means."

Statement of the Case

The facts out of which this proceeding arises are not in dispute.

Since November 28, 1925, petitioner has held various classes of radiotelegraph and radiotelephone operator's licenses issued by the Commission and its predecessor bodies (J. A. 14, 15, 76).* His first commercial license was issued on October 17, 1927. He has held a first class radiotelegraph license continuously since November 1, 1933 and a first class radiotelephone operator's license continuously since August 7, 1936. Further, since 1937, he has engaged in occupations dependent, in varying degrees, on the holding of a license (J. A. 15, 18, 76-77).

Included in these occupations have been service during World War II with the Federal Bureau of Education, as an employee of the American Export Airlines and as a radio operator in the United States Maritime Service in the Atlantic and Pacific theatres of war (J. A. 18, 19, 77).

Petitioner is presently employed under the terms of a collective bargaining agreement which provides, in part, that he may be required to hold, as a condition of continued employment, a first class operator's license (J. A. 7, 14, 80).

Radiotelegraph and radiotelephone operator's licenses were last issued to the petitioner in March of 1953, each for a term of five years (J. A. 16, 77). In March, 1958, petitioner executed timely applications for renewal. Ten days later the Commission addressed a letter to him informing him that it required additional information before taking action with respect to these applications.

* References are to the Joint Appendix filed in the Court of Appeals.

The petitioner was requested to answer, under oath, the following questions:

> "1. Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership.
>
> 2. Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States or of any political subdivision thereof, by force or violence? If the answer is yes, list the organization or group and give the dates of membership." (J. A. 24, 25)

The petitioner declined to answer the questionnaire because he felt "that the Commission does not have the legal authority to require the answers to this questionnaire as a condition for renewal of [his] license and, further, that it is an infringement of [his] constitutional rights" (J. A. 26).

A hearing was subsequently held before a Hearing Examiner designated by the Commission, such hearing being confined to the determination of (1) whether petitioner failed to answer lawful questions with respect to his qualifications to be a licensee and (2) whether, in the light of the evidence adduced under issue (1), he possessed the necessary qualifications to hold a radio operator's license (J. A. 3, 4, ff.).

The Decision and Order of the Commission held that the Commission had the authority to ask the questions and that the petitioner's application would be dismissed in the light of his refusal to answer (J. A. 75, 81, 98).

Reasons for Granting the Writ

1. This Court has frequently held that the power of an administrative agency to inquire into the political activities and associations of a citizen will not be implied from general statutory language. Especially is this true when, as in this case, there is no administrative or legislative history to justify such inquiry.

The leading case on the subject is *Kent* v. *Dulles*, 357 U. S. 116, where the Court held that the right of an administrative agency to inquire into the political activities of a citizen of the United States will be most narrowly construed and will not be implied from the general language of a regulatory statute. The constitutional right to travel involved in the *Kent* case, is no more a basic and fundamental right than the constitutional right to engage in a lawful occupation. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Meyer* v. *Nebraska*, 262 U. S. 390; *Truax* v. *Raich*, 239 U. S. 33; *Cummings* v. *Missouri*, 4 Wall (71 U. S.) 277; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955).

The language of the *Kent* case, with but few modifications, might be applied to this case; the same is true of *Greene* v. *McElroy*, 360 U. S. 474, where the Court held that the industrial security program administered by the Defense Department was invalid because there was no clear authorization, either by Congress or the President, for the existence of a program which conducted inquiry into the political activity and association of industrial employees. So here, there is no authority at all for the actions of the Commission which so closely impinge on our constitutional liberties.

2. There is in the present case, as in *Kent*, an administrative practice of long standing and, furthermore, a legislative history which makes it abundantly clear that the Commission does not have the power it claims.

The right now asserted by the Commission to submit political questionnaires to applicants for licenses was first asserted in 1954; prior to that date, the Commission had repeatedly disavowed any jurisdiction over this subject matter.*

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* The Commission has had ample opportunity to exercise the power it now claims. It has issued millions of licenses since its creation; there were, at the end of the fiscal year 1958, 1,500,854 licenses and permits outstanding. Over 300,000 applications are filed in an average year.

Sections 303(l) and (m) of the Act are copied directly from the Radio Act of 1927 (44 Stat. 1164). There is no evidence that the Federal Radio Commission, the predecessor to the Federal Communications Commission, or the Department of Commerce, which originally issued licenses to radio operators, ever applied a political test to applicants or licensees or had ever manifested any interest in their political affiliations or activities.

The application forms used by the Commission since its organization have not contained any questions relating to the political activities of an applicant (J. A. 6). Except for a single instance in 1954 (*Matter of Lafferty*, 23 F. C. C. 761),* there is no evidence that the Commission had ever addressed such questions to any applicant until 1958, when the petitioner and three other applicants were asked the questions now at issue.

The petitioner testified that never before had he been asked any such question, and that neither the Department of Commerce, the Federal Radio Commission or the Federal Communications Commission, prior to 1958, had ever manifested any interest in his political activities (J. A. 19).

There is thus a significant history of the failure of the Commission to assert the authority it now claims. *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 352; *Mintz* v. *Baldwin*, 289 U. S. 346, 351; *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 51 (C. A. D. C. 1953).

It is not only on such negative evidence that petitioner relies. Both Congress and the Commission have, in the past, been in agreement that the Commission does not have the right it now asserts.

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* The Commission first submitted a political questionnaire to Lafferty in 1954. His case was widely regarded as a test case and, indeed, the Commission had it under consideration for three years before handing down an order holding that it had the authority to question applicants concerning their political affiliation. It is our understanding that Lafferty died pending an appeal from the ruling of the Commission and hence his case became moot.

Twice in its history the Commission has considered the establishment of qualifications for a license other than technical and citizenship requirements. In 1938, a proposal to modify the rules to permit the setting of "mental" and "moral" qualifications was dropped when objection was made on grounds of lack of authority. (See FCC Docket No. 5218, pp. 241, 253, 335; J. A. 9, 10.) In 1955 a proposal was made to prohibit the issuance of radio operators' licenses to members of the Communist Party (Dockets Nos. 11060 and 11061). Again, it was argued, in opposition, that the Commission did not have the power to impose political tests on applicants or to inquire into their political affiliation. Those proceedings have been pending undetermined for over five years (FCC Docket Nos. 11060 and 11061; J. A. 6).

The relevant Congressional history is equally significant as bearing on the Commission's lack of power. In 1940 and 1941 Congressman Izak introduced bills to amend the Communications Act to give the Commission the right to refuse to issue a license to an applicant who was "subversive" and to suspend licenses of radio operators found to be "subversive". The bills (H. R. 10446, 76th Cong.; H. R. 3364, 77th Cong.) were referred to Committee and were not reported out.

In the 77th Congress, Congressman Dirksen introduced H. R. 2662, a comprehensive measure designed to establish hiring halls for merchant seamen, continuous discharge books, and other related matters. Sections 107 and 108 of the bill provided that the Commission would have the right to deny a license to any radio operators "with respect to any shipping station" if he were guilty of subversive activities.

Hearings were held on that bill beginning on February 26, 1941. Congressman Dirksen told the committee that the Federal Communications Commission had testified before the House Appropriations Committee that it had

never inquired into the desirability of license holders in any respect other than technical qualifications and that there was no provision in the law for the revocation or denial of a license for subversive activities. Congressman Dirksen explained that his bill was intended to remedy this defect, and that the Izak bill was intended for the same purpose. (Hearing on H. R. 2662, House Committee on Merchant Marine & Fisheries, 77th Congress, 1st Sess., Feb. 26, 1941, p. 10 ff.)

Like the Izak bill, the Dirksen bill was not reported out of Committee. However, Congressman Bland subsequently introduced a bill (H. R. 5074, 77th Congress) designed to treat specifically with the problem of allegedly subversive persons engaged as radio operators in the United States Merchant Marine. There is no record of hearings on the Bland bill in the House. The bill itself was limited in its scope. It was to have been effective only until July 1, 1943. It proposed to amend the Communications Act to define a "subversive individual" and further proposed to amend §§ 303(l) and (m) to prohibit the issuance of licenses for maritime service to subversive individuals and to authorize the suspension of licenses to such persons. This bill was reported favorably. Congresman Ramspeck, in discussing it on the floor of the House on July 22, 1941 said:

> "It developed that the present law does not give the Federal Communications Commission, which issues licenses to these operators, the right to make inquiry about anything except the technical qualifications of radio operators. This bill proposes to amend the Act so that they may inquire as to their character and their background.
>
> " * * * If they find an applicant is a subversive individual or that there is a reasonable probability that he is, they can deny the applicant a license." (87 Cong. Rec. 6259, July 22, 1941, 77th Cong., First Sess.)

On September 19, 1941, hearings were held before the Senate Committee on Commerce. A number of non-governmental witnesses testified, stating that the Commission at the present had no power to deny licenses to "subversives". To the same effect was testimony by Admiral Hooper of the Navy Department and Secretary Stimson of the War Department (Hearing on H. R. 5074, Senate Committee on Commerce, 77th Cong., First Sess., pp. 71 and 75).

A memorandum was submitted to the Senate Committee by the Federal Communications Commission itself. The Commission did not discuss its lack of authority to investigate subversive activities of license holders; such lack of authority was assumed. Instead, the Commission objected to the bill on the ground that it was not qualified to examine into the matter of the subversive activities of applicants, that its staff was not equipped for that purpose, that it had had no experience in that area, that it had no procedures which would make such investigations feasible, and that it preferred not to have the authority which the Act would give it. (Hearings, pp. 77-79.) See also a statement by the Maritime Commission, *ibid.* pages 79, 80.

Evidently the Senate heeded the objections of the Commission because it abandoned the Bland bill and reported, instead, a bill which gave to the Navy Department the right to screen "'subversives" employed as radio operators in the Merchant Marine. It further provided that this power should end with termination of hostilities (Public Law 351, 77th Congress). The bill was actually passed in the Senate on December 88, 1941, without significant debate.

The failure of the Commission in 1938 to permit inquiry into the very limited area of "moral qualifications" of applicant is an indication of the Commission doubts, in 1938, as to its authority to go beyond technical qualifica-

tions. The *Lafferty* case was pending before the Commission for a full year between final argument and decision—still further indication of the Commission's lack of confidence in its own position. And, as is noted above, a proposal for an amendment of the rules has been pending undecided since 1955.

3. There is also internal evidence within the Communications Act that § 303 cannot be interpreted as broadly as the Commission now contends. Section 303(m) enumerates the grounds for the revocation of a license, and well known principles of statutory construction would require that such enumeration would exclude grounds not enumerated. Since the general subject of political activities or membership in "subversive" organizations is not listed in subdivision (m), it would seem that the Commission does not have the power to revoke licenses for such reason.

It would be anomalous that the Commission would have the right to deny a license to applicant for reasons insufficient to justify revocation.

4. This Court has had frequent occasion to consider the effect upon First Amendment freedoms of belief, activity and association of the kind of inquiry undertaken by the Commission in this case. The language of the Court in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, at 462, is an eloquent statement of the vice inherent in the kind of political inquiry which the Commission here seeks to make.

Membership in the Communist Party, like any other kind of political activity, enjoys the presumption of innocence and the protection of the First Amendment in the absence of personal activities in violation of criminal statute. *Yates* v. *United States*, 354 U. S. 298. Inquiry into such activities by a governmental agency is prohibited by

the First Amendment. *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Speiser* v. *Randall*, 357 U. S. 513. It is beyond the power of government officials to determine what ideas are good or bad, or what organizations are good or bad. *West Virginia Board of Education* v. *Barnett*, 319 U. S. 624; *Thomas* v. *Collins*, 323 U. S. 516. The principle of guilt by association is abhorrent to our law and mere membership in an organization cannot itself be evidence with respect to the eligibility of applicant for a license. *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242.

The serious consequences upon constitutional freedoms of the sort of "disclosure" procedure followed by the Commission are well known to all and are adequately discussed by the Supreme Court in the *Watkins*, *Sweezy* and *NAACP* cases referred to above.

5. This case may reasonably be regarded as a test case of the Commission's authority. The issue has never been before this Court before, and there are a considerable number of similar cases whose disposition awaits on the decision in this case.

Since the decision here, the Commission has made a similar decision in *Matter of William C. Cronan*. Mr. Cronan has likewise appealed and his case is now pending in the Court of Appeals for the District of Columbia as No. 15,760. In addition, counsel for petitioner represents at least six other persons whose renewal applications have been held up by the Commission pending the determination of this case;* there may be still other similar pending matters.

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* *Boothroyd*, Docket No. 13536; *Jones*, Docket No. 12903; *Hauser*, Docket No. 12881; *Townsend*, Docket No. 12882; *Osband*, Docket No. 13056; and *Blumenthal*, Docket No. 12760.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 7, 1960.

Appendix A

(Opinion of the United States Court of Appeals for the District of Columbia Circuit)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15473

MORTON BORROW, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal from the Federal Communications Commission

Decided June 30, 1960

Mr. Victor Rabinowitz, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for appellant. *Mr. Leonard B. Boudin* also entered an appearance for appellant.

Mrs. Ruth V. Reel, Counsel, Federal Communications Commission, with whom *Mr. John L. FitzGerald*, General Counsel, Federal Communications Commission, *Mr. Max D. Paglin*, Assistant General Counsel, Federal Communications Commission, and *Mr. Joel Rosenbloom*, Counsel, Federal Communications Commission, were on the brief, for appellee.

Before PRETTYMAN, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PRETTYMAN, *Chief Judge*: Appellant Borrow was an applicant for the renewal of a radio operator's license, first-class. This license would entitle him to operate trans-

mitter apparatus at radio or television stations, aboard vessels of the Merchant Marine, and at coast radio stations. He had held similar licenses, each limited to a term of years, since 1927. At the time of his latest application for renewal he was employed by the operator of two radio stations in Philadelphia. In connection with this application he was asked by the Communications Commission, as part of the requisite data, two questions which are the subject of the present controversy. They were:

> "1. Are you now or have you ever been a member of the Communist Party?
>
> "If the answer is yes, give dates of membership:
>
> "2. Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence?
>
> "If the answer is yes, list the organization or group and give the dates of membership:"

Borrow refused to answer either question on the ground that the Commission had no legal authority to require answers to these inquiries as a prerequisite to renewal of his license. He requested a hearing in the following language:

> "Under the circumstances I hereby request a hearing so that I may present in the appropriate form my reasons for refusal to answer the questionnaire."

Such a hearing was held, and an initial decision by the Examiner and a final decision by the Commission were rendered. The proceedings did not involve the grant or refusal of the license. They involved only the questions (1) whether the Commission had the right to ask the questions and (2) whether, if so, Borrow's refusal to answer precluded a determination that he was qualified to hold the license requested.

The Commission reaffirmed the position it had taken in a previous case[1] and, after a long discussion, concluded:

> "24. In summary, the Commission has determined that, in ascertaining whether a grant of Mr. Borrow's application would serve the public interest, it requires information as to whether or not he belongs to or has belonged to certain organizations which advocate or are reputed to advocate the overthrow of the government of the United States by force and violence. It requires such information as a prerequisite to reaching the statutorily necessary conclusion that a grant of the subject applications would serve the public convenience, interest or necessity, because of the nature of the employment available to licensees and the close relationship of such employment to the interests of national defense. * * * In the absence of the requested information, the Commission would deem it an abuse of its discretion to affirmatively conclude that a grant of Mr. Borrow's application would serve the public interest."

The Commission dismissed the application.

No procedural defects appear in the proceedings. The hearing requested was granted. The applicant was present and was represented by counsel. The full Commission later heard the matter, considered it, and decided it.

We examine the power of the Commission in respect to issuing operators' licenses. The Communications Act,[2] in Section 303, provides:

> "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity require, shall—
>
> * * * *
>
> "(1) Have authority to prescribe the qualifications of station operators, to classify them according

[1] Travis Lafferty, 23 F.C.C. 761, 13 P & F RR 641 (1957).

[2] 48 Stat. 1064 (1934), as amended, 47 U.S.C. § 151 *et seq.* (1958).

> to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified, * * *."

The statute requires the Commission to make available a nation-wide radio service, *inter alia*, "for the purpose of the national defense."[3]

Thus it is clear upon the face of the statute that the Commission is empowered to prescribe the qualifications of station operators and to issue licenses only to those whom it finds qualified. It is not authorized to issue licenses except as the public interest, convenience or necessity requires—not "permits" but "requires". Pursuant to this statutory authority the Commission has prescribed that no license will be issued until the applicant has successfully passed a technical examination and "is found qualified in respect to citizenship, character, and physical condition".[4] "Character" in respect to a radio operator obviously includes reliability in the situations in which such an operator must operate.

So the problem before us is whether the questions asked were pertinent to the requirements of the public interest, etc., and to proper standards of qualification for a radio operator. This is a practical, not merely an academic, problem. It seems to us it would be difficult to imagine

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[3] Sec. 1, 47 U.S.C. § 151 (1958).

[4] 47 C.F.R. § 1.71(a). The Senate Committee on Interstate and Foreign Commerce, in reporting favorably on an amendment to the Communications Act not here relevant, added the following caveat: "Under the provisions of the Federal Communications Act of 1934, as amended, the Federal Communications Commission is required to find, with regard to every license issued by it, that the public interest will be served thereby. In making this finding, the Commission necessarily must weigh the character qualifications of persons seeking radio operator licenses. The committee desires to emphasize that this bill, as amended, does not relieve the Commission of this affirmative responsibility." S. REP. No. 2338, 85th Cong., 2d Sess. (1958).

a question more relevant or more material to the qualification of a radio operator under the statutory criteria than is the second of the two questions asked. Radio beams are the operational essence of quick modern communication and of the control of modern weapons. Not only the power to use these electronic devices but the power to interfere with waves being used by others should, it might properly seem to the Commission, be lodged in those whose loyalty to the United States is made to appear. Surely no such power should knowingly be accorded to those who belong to organizations advocating or teaching the overthrow of this government by force or violence.[5] At the very least the Commission is entitled to know whether those whom it licenses to control these devices belong to such an organization. Any program less than that simple necessity would be not only short-sighted but dangerous to the national security.

Before the Commission and before us the thrust of Borrow's argument was his complaint concerning the first of the two questions asked, *i.e.*, the question relating to membership in the Communist Party. But he refused to answer the second question also, *i.e.*, the question relating to membership in an organization which teaches or advocates the overthrow of the Government of the United States by force and violence. The Commission commented:

> "* * * at least with respect to this question, even Borrow does not argue as to the propriety of the Commission's inquiry and he presents no color of justification for his refusal to answer. On the sole basis of his refusal to answer this clearly pertinent question, and his failure even to alleged good cause

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[5] The position of radio operator with respect to our national defense was described during World War II by Mr. Fly, then Chairman of the Communications Commission, in testimony before the House Committee on Appropriations; 77th Cong., 2d Sess., on the first Supplemental National Defense Appropriation Bill for 1943, page 17 (1942). He said they are the men "who are sitting at the nerve centers of our whole military system". We think the description is equally apt today.

> for his refusal, the Commission would be required to dismiss his application."

Surely this second question could not be characterized as a mere inquiry into political affiliations. Such advocacy is a crime; indeed one of the highest order. No justification for the refusal of an applicant for a radio operator's license to answer this question is shown to us, nor can we conceive of one.

In his concurring opinion in the *Joint Anti-Fascist* case,[6] Mr. Justice Douglas wrote succinctly:

> "The problem of security is real; and the Government need not be paralyzed in handling it. The security problem, however, relates only to those sensitive areas where secrets are or may be available, where critical policies are being formulated, or where sabotage can be committed. * * * The question is one of the fitness or qualifications of an individual for a particular position."

The area involved in the case at bar is a sensitive area. Secrets of international communications are available; critical policies are formulated by the interchange of radio communications; opportunities for sabotage at critical times by false messages, by failing to shut down the station when ordered to do so, by "jamming" necessary broadcasts, are plentiful and critical. The question before the Commission, in direct, stark form, was the fitness of this applicant for a particular position, as a radio operator—not upon the merits of all relevant data but in the face of his refusal to answer questions required as part of his application.

The underlying premise of Borrow's argument, discussing almost entirely the first question put to him, is that membership in the Communist Party is merely a matter

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[6] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123, 181 (1951).

of political affiliation. This court has repeatedly pointed out that the President, the Congress, and the Supreme Court have declared in emphatic terms that the Communist movement is a world-wide conspiracy for power, inimical to the peace of the world and to the safety of this country. In the present state of world affairs adherence to the Communist cause is not merely a political opinion. Membership in the Party *vel non* is a proper introductory query in this area; the answer may dispose of the subject, or it may necessitate explanation which, in turn, may or may not be acceptable.

Borrow says his First Amendment rights are being infringed. We cannot agree. His right to be a licensed radio operator is not unlimited, merely because of the First Amendment. Qualifications of character, reliability and judgment apply. The public interest must be served. He desires to operate a facility which in the public interest is necessarily licensed by the Government. He has affirmative standards to meet in order to secure a license, just as do doctors, lawyers, barbers, and lenders of money. An unqualified right to pursue any chosen occupation, merely by reason of the First Amendment, is a wholly untenable proposition. As the Court observed in *American Communications Ass'n* v. *Douds*,[7] the Amendment "does not require that he be permitted to be the keeper of the arsenal."

Borrow relies upon *Graham* v. *Richmond*[8] but that case did not deal with our present problem. There the appellant had been denied a hearing although the regulations provided for one. The decision of this court, premised upon *Service* v. *Dulles*,[9] was that the regula-

[7] 339 U.S. 382, 412 (1950).

[8] 106 U.S. App. D.C. 288, 272 F.2d 547 (D.C.Cir. 1959).

[9] 354 U.S. 363 (1957).

tions must be complied with and a hearing afforded. No such problem is now at bar, as Borrow was given the hearing he requested.

The conclusions of the Commission in this matter were exhaustive, careful, well-reasoned. Its decision is

Affirmed.

WASHINGTON, *Circuit Judge, dissenting:* I do not doubt that there are strong reasons of public policy for seeking to insure that radio operators will be loyal and trustworthy at all times, and particularly in the event of a national emergency. But the same is true of a large part of our population, given the times in which we live. Railroad engineers, airline pilots, electrical system operators, reservoir inspectors, gas pipeline controllers—the list of people who can play vital roles in the functioning or nonfunctioning of our system is well-neigh endless. If these people are required to be licensed by some federal, state or local agency—and many of them are—does it follow that the licensing authority can ask them about possible Communist connections, and deny them a license (and possibly a livelihood) for failure to answer? Or for giving an unacceptable answer? Perhaps we will come to that. But if we do, it should be a legislative and not an administrative decision: a decision made after careful consideration of the needs of the national security, and of the possible consequences on the availability, mobility and self respect of our people. Decisions of that sort should be made after fullest deliberation, by those who represent the electorate—rather than by appointed officials regulating a single segment of our economy.

The Supreme Court has made it quite plain that the Government cannot act to deprive a private individual of valuable rights and privileges on security grounds unless the deprivation has been clearly and validly authorized by law. *Greene* v. *McElroy*, 360 U.S. 474 (1959);

Kent v. *Dulles*, 357 U.S. 116 (1958). Cf. *Konigsberg* v. *State Bar*, 353 U.S. 252 (1957). Here I can find no such authority.

The Communications Commission relies on the statutory provisions authorizing it in general terms to prescribe the qualifications for radio operators and to issue licenses to such citizens as it finds qualified, giving due regard to the public interest. There is no specific statutory provision empowering the Commission to inquire on security grounds into the Communist or other affiliations of an applicant for a license. Nor is there any valid basis for implying that Congress intended that the Commission have such authority.

On the contrary, Congress has refused in the past to give the Commission the authority it now claims to possess. The Izac bill in 1940,[1] the Dirksen bill in 1941,[2] and the Bland bill in the same year[3]—all would have given the Commission the power to refuse to license "subversives" as radio operators. None of these bills, with the exception of Bland, reached the floor. All, including Bland, were based on the assumption that the Commission lacked the requested authority. The Bland bill was rejected in the Senate. Congress did, however, pass a bill giving like authority to the Navy Department with respect to radio operators in the Merchant Marine. This statute has now lapsed by reason of the termination of hostilities.

One reason the Bland bill failed was that the Communications Commission itself objected to it, largely on the ground that the Commission was unprepared to make investigations into subversive activities, and did not wish to undertake them. Nothing appears which would suggest that the Commission is equipped today to pass upon

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[1] H.R. 10440, 76th Cong., 3d Sess. (1940); also introduced as H.R. 3364, 77th Cong., 1st Sess. (1941).

[2] H.R. 3962, 77th Cong., 1st Sess. at 106-107 and 108 (1941).

[3] H.R. 5074, 77th Cong., 1st Sess. (1941).

such matters. Certainly there is nothing to suggest that Congress has by implication authorized it to do so. The statutory language on which the Commission now relies is the same language that has been on the books since 1927.[4] If this language gave no authority in this field in the past, it gives none today.

In 1955 the Commission began consideration of a proposed rule which would prohibit the issuance of radio operators' licenses to members of the Communist Party.[5] Those procedings are still pending—undetermined. The Commission has adopted no regulation barring Communists or subversives. It has set no standards and fixed no procedures. Its application forms contain no mention of the matter, much less any questions about it. But of late the Commission has sent supplemental letters to certain applicants, asking the questions here complained of. This procedure is not supported by any published rule.

Compared to the flimsy framework on which the Commission rests its case, the statutory and regulatory basis on which the Secretary of State rested his claim to deny passports on security grounds in *Kent*[6] was truly monumental. Yet the Supreme Court struck down his claim, sturdily buttressed as it was. In the instant case, where a man's livelihood is involved, I think we have no alternative but to say that the Commission lacks the authority which it now asserts.

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[4] See Sections 5(C) and (D) of the Radio Act of 1927, 44 STAT. 1164.

[5] Dockets Nos. 11060 and 11061.

[6] Kent v. Dulles, 357 U.S. 116 (1958).